The Spanish penitentiary system

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Legal framework

Penitentiary activity is regulated by the General Penitentiary Law of 1979, and by the current Statutory Instruments of 1996, which has updated the latter. Before entering into the description of legal texts, it seems necessary for us to explain that this General Penitentiary Law was approved by the Parliament unanimously, with a total consensus between the political parties at that time. The Constitution of 1978 concluded the process of democratic transition of Spain and definitively ended the dictatorship that General Franco had established in our country at the end of the Civil War, following his revolt against the legitimate government of the Republic in July 1936. The General Penitentiary Law of 1979 was one of the first general laws that the new Parliament approved. It led to the first elected democratic government in 1978. This General Penitentiary Law was probably approved unanimously because many members of the Parliament and of the first democratic administration were men and women who had been deprived of their freedom during the dictatorship. The sensitivity of that parliament to the penal system is thus explained in part by the experiences of a large number of parliamentarians, and by their hope and confidence in humanitarian values in the development of the new democracy.

Program declarations of the General Penitentiary Law of 1979

The intent of this law expresses itself in three different declarations. First, in a clear definition of the goal of the law: the rehabilitation of persons sentenced to prison. Secondly, the definition of the concept of prison sentence the legal text uses is emblematic in that it deviates from the traditional term used in all previous penal codes and defines this as the deprivation of liberty only, which allows prison sentences to be served in open penitentiary regimes, with minimal deprivation of liberty. Thirdly, the law specifically declares all persons deprived of liberty entitled to social, civil, political, economic and cultural rights to a degree not expressly limited by the sentence. Article 4 of the law reinforces this statement in describing in detail the prisoner’s rights.
**External Control**

Together with the three program declarations, the General Penitentiary Law establishes the submission of penitentiary activity to the direct control of an ordinary penal jurisdiction, carried out by a specialised magistrate called the Penitentiary Surveillance Judge. This judge may revoke all the acts of the penitentiary administration which deals with the rights of all prisoners. Accordingly, not only the penitentiary activity has its own administrative control, which corresponds to any public administration surveillance, but also a specific and direct control of a specialised judge whose work is to guarantee the prisoners’ rights.

The Penitentiary Surveillance Judge is a judicial authority like any other. He is vested with the right of penitentiary control in first place and is part of the judiciary. Appeal is possible before sections of the Provincial Penal Hearings (in the biggest cities, special chambers of the specialised Provincial Hearings exist) and with the possibility to appeal, in some cases, before the Supreme Court itself. Article 69 General Penitentiary Law describes the function of the Penitentiary Surveillance Judges as follows: “The Surveillance Judge has jurisdiction to enforce the punishment imposed, to preside over appeals concerning the modifications in conformity with the laws and the statutory instruments, to safeguard the rights of the prisoners and to correct the abuses and deviations of the penitentiary rules”.

The Surveillance Judge is competent for a number of decisions, including:
- all decisions related to the execution of the sentence, assuming the functions that would correspond to the sentencing judges and courts;
- proposals of parole and on revocations;
- approving the proposals to shorten the sentence;
- approving detention in solitary confinement superior to fourteen days;
- complaints on initial classification, progression and regression of level, according to the reports made by the Treatment and Observation teams and those of the Observation Centre;
- prisoners’ complaints on the use of disciplinary sanctions;
- prisoners’ complaints on the regime and the penitentiary treatment when they affect fundamental rights or penitentiary benefits; and
- leaves superior to two days, except those classified as third degree.

The Surveillance Judge also carries out visits to the penitentiary institutions as planned in the Code of Criminal Procedure. In this case, the Central Judge of the Penitentiary Surveillance may obtain the judicial aid of the Penitentiary Surveillance Judge in charge of the institution to be visited. He is also
informed of the transfer of prisoners to closed regime institutions that are asked by the director of the institution.

Despite its long and detailed enumeration, this article of the General Penitentiary Law does not give a clear idea of the largest scope of the judicial officers. Nevertheless, since thirty years, this institution has developed an important case law that has turned into an authentic element of the monitoring of the rights of prisoners which, with no doubt, will be integrated in the new Code of Criminal Procedure, whose reform is currently being prepared.

The Penitentiary Surveillance Judge was a completely new officer within the framework of the penitentiary administration. Perhaps the 1978 legislator was not conscious of the importance the direct judicial control could have on the penitentiary administrative activity. When the law passed, the Ministry of Justice limited the attribution of this new jurisdiction to criminal law judges in addition to their existing jurisdictions. There are now more than fifty Penitentiary Surveillance Judges. In larger cities as Madrid, five magistrates of the Provincial Hearings Chamber are exclusively dedicated to prisoners’ complaints against decisions of the Penitentiary Surveillance Judges.

The first years were difficult, since the penitentiary administration were reluctant to such an external control. New judicial rules were necessary, including those of the Constitutional Court, which limited jurisdictions and consolidated the new judicial institution. Today, no specific procedure on the operation of these Courts of Penitentiary Surveillance has been issued yet, but it is undisputed that their jurisdiction covers all penitentiary activities that can in any way limit prisoners’ rights.

The different systems of detention

The General Penitentiary Law distinguishes between pre-trial detainees and convicted prisoners and essentially deals with these latter. From a constitutional law perspective, the penitentiary regime pursues a rehabilitative goal. Articles 63 and 64 General Penitentiary Law deal with the prisoners’ treatment. According to article 63, the individualisation of treatment is based on the convict’s classification, after a suitable observation. The prisoner will serve his incarceration in an establishment whose regime is best adapted to his treatment. The classification must take into account a number of elements including the personality and the individual, family, social and criminal history of the prisoner, as well as the length of his detention, the environment to which he will probably return and the difficulties he may face in prison. According to article 64, the observation of pre-trial detainees is limited to collecting the best information possible on them through documentary data and
interviews, and by means of direct observation of their behaviour. On this basis, a classification in groups, to which article 16 refers, is established as far as this is compatible with the presumption of innocence. Once convicted, the information collected will be completed with a scientific study of the personality of the convict, followed by a diagnosis of his criminal capacity and social adaptability. A proposal of the degree of treatment corresponding to a specific type of institution will then be formulated.

The main criteria to place a prisoner in a specific penitentiary regime correspond to the type of treatment (e.g. pedagogical and therapeutic), which is found to be best indicated for his rehabilitation. For pre-trial detainees, only a superficial study of his characteristics is deemed necessary but a more in-depth study of his characteristics is needed once convicted.

The General Penitentiary Law does not specifically describe the different penitentiary systems. Article 74 Penitentiary Statutory Regulation 1996 describes the following different types of regimes:
- the ordinary regime, applied to prisoners classified as second degree;
- the open regime, applied to prisoners classified as third degree; and
- the closed regime, applied to prisoners and pre-trial detainees classified as first degree, due to their extreme danger or maladjustment to previous common regimes.

The difference between the three types of penitentiary regimes is that of greater or lesser freedom granted to prisoners. The key elements describing these different degrees of freedom are related to the possibility of being granted a certain amount of time in liberty, outside the prison, either through penitentiary leaves or the possibility of working outside the institution during the day, as well as by greater freedom within the institutions.

*Ordinary regime*

This regime is applicable to all convicted persons who have been classified as second degree, and to those who have not been classified yet by the institution, as well as the majority of prisoners on remand. This regime, which is the most common, incorporates the possibility of being granted a maximum of 36 days of leave outside the penitentiary centre in intervals not superior to seven days, as well as and in accordance with, a specific treatment for their rehabilitation, and certain individual leaves of artistic, cultural, sport or therapeutic nature.
Within the penitentiary centre itself, the prisoners classified in ordinary regime may attend general activities and meet with other prisoners. They must only be in their cells during times considered of obligatory rest.

Open regime

This regime grants more freedom outside prison. The different levels of freedom and the different agreements within this open regime establish three different systems as well, that are all for prisoners classified third degree. This regime takes place in two types of penitentiary centres designated as Open Centres or Centres for Social Reintegration, in open units of closed penitentiary centres or in Dependent Units which usually are non-penitentiary houses. In any case, the common characteristic of the open regime is that prisoners are granted a certain number of hours of freedom outside the penitentiary. Convicts must only reintegrate the institution at night, and they have 48 days of leave per year, as well as weekends.

Closed regime

Article 20 General Penitentiary Law 1996 describes two types of closed regimes: the first is organised in special departments (see e.g. art. 93) and the in closed units second (see e.g. art. 94). This regime is applied to certain prisoners with regards to their offence or behaviour. This regime is usually assigned to prisoners on remand or convicted that are presumed being linked to the organisation ETA, guilty of terrorist acts, gang members or considered at high risk because of their extremely undisciplined behaviour. This regime does not allow any type of freedom, ordinary leaves and, in some cases, even reduce community life in prison.

Classification of prisoners

The classification of prisoners to the different regimes involves a series of personal interviews to identify the character of the prisoners, as well as the study of their criminal and penitentiary records. The classification is made by technical teams of the penitentiary centres and is repeated every six months. The Penitentiary Law of 1996 describes how the classification should be carried out. Article 103 establishes that the Treatment Boards (administrative agencies of the penitentiary centre), after its analysis, must issue a classification proposal, which is send to the director of the penitentiary system.
This first classification is repeated every six months in order to evaluate the progress of the prisoner. If, for whatever circumstances, the treatment team keeps a prisoner during two inspections in the same penitentiary regime, he may ask the Observation Centre, specialised in penitentiary classification, to recommend a change of regime.

In any case, all processes of classification, including ordinary or extraordinary revisions, are subject to appeal before the Penitentiary Surveillance Judge. The Judge will have to evaluate the classification carried out by the treatment team or the Observation Centre. He may revoke their decision and classify the prisoner in a degree he considers more adequate regarding the prisoner’s profile, his offence and progress in the treatment.

**Prison discipline**

Prison discipline consists of two different aspects, both essential in penitentiary life. On the one hand, a disciplinary measure means, by definition, a fundamental restriction of freedom within the regime to which each prisoner has been assigned. On the other, disciplinary measures have consequences on the global assessment of the prisoner’s behaviour, which can lead to either the regression of their regimes, or the deprivation of certain penitentiary benefits, such as early leaves.

We shall see, therefore, which are the activities that are considered disciplinary offences and their corresponding sanctions, the process to repeal or appeal these sanctions and the consequences these measures have on the characteristics of the different penitentiary regimes.

**Offences against discipline**

The General Penitentiary Law does not outline the offences against discipline for which a prisoner can be charged. Although they normally respond to the enumeration of the responsibilities described in article 9 Penitentiary Law 1996, the previous articles 108 and 109 General Penitentiary Law 1981, enumerated minor and serious offences against penitentiary discipline, such as drugs trafficking.

**Sanctions**

Disciplinary measures include solitary confinement which cannot exceed fourteen days, suppression of leaves for a time not superior to two months, limitation of communications with family and relatives, suppression of rec-
reational acts and reprimands. The seriousness of solitary confinement (always a prison within the prison) is regulated in great detail in the General Penitentiary Law. Solitary confinement can only be applied when the prisoner indicates an aggressive or violent attitude, or when he repeatedly alters daily life in the centre. Cells for solitary confinement have the same characteristics of any others in the institution and a doctor has to visit the inmate and report on his physical and health conditions on a daily basis to determine whether or not it is necessary to suspend or modify the sanction. Solitary confinement may not be applied to pregnant women, women who have given birth six months before, or to nursing mothers with children.

Appeals of sanctions

Both the General Penitentiary Law and the General Penitentiary Statutory Instruments establish a very detailed system for the imposition of sanctions. Generally, a deposition against the prisoners is required. The prisoner may then respond to the charges he is accused of before the Disciplinary Commission (an administrative organ in each penitentiary centre). In any case, prisoners have the right to appeal to the Court of Penitentiary Surveillance, or the Penitentiary Surveillance Judge.

Penitentiary benefits

The concept of penitentiary benefits refers to all types of measures that may attenuate the sentence. Penitentiary leaves are sometimes included within this concept. They have been considered as an integral part of the system of deprivation of liberty itself, and as a necessary instrument for the treatment and rehabilitation of prisoners, which is the constitutional objective of detention, according to article 25.2 of the Constitution. Leaves can be ordinary or extraordinary.

Ordinary leaves

Ordinary leaves, as we have already mentioned, are seen as an instrument for re-integration.

Leaves for persons classified as second degree (ordinary regime)

Prisoners that are classified as second degree (ordinary regime), may be granted leaves for a period up to seven days and up to a total of 36 days per
year when they have served a quarter of their sentence and have not been sanctioned for any misbehaviour. These leaves are based on a report done by the Technical Support Team of the penitentiary centre and approved by the Penitentiary Surveillance Judge. Usually, the prisoner asks for a leave and the centre decides whether the required objectives are met: ordinary regime, service of one quarter of the sentence and absence of disciplinary measures. However, if the technical team considers the prisoner not yet ready for life outside the walls, the leave may be denied. The prisoner may appeal to the Penitentiary Surveillance Judge. If the decision of the Penitentiary Surveillance Judge is negative, the prisoner has the right to appeal before the Provincial Hearing, which may revoke the decision and authorise the leave.

*Leaves for prisoners classified as third degree (open regime)*

Prisoners who are granted this regime have up to 48 days of leave a year in addition to all weekends.

*Extraordinary leaves for therapeutic or treatment reasons*

These leaves exist, without any limitations, although they have to be justified by reasons of a personal nature (e.g. family circumstances, births, diseases, deaths of relatives) medical reasons (e.g. visits to hospitals for medical interventions) or specific treatment (all types of recreational or sport activities, therapeutic sessions, et cetera).

*Parole*

There are two types of parole: ordinary and extraordinary. Ordinary parole takes place when the prisoner is in third degree regime, has served three-quarters of his sentence and has demonstrated a good behaviour. Extraordinary parole takes place when the prisoner in third degree regime has only served two-thirds of his sentence and demonstrated good behaviour. This is not only regulated by the General Penitentiary Law and its Statutory Instruments but also by the Penal Code in articles 90, 91, 92 and 93 (grant of parole and rules of conduct). In addition, the General Penitentiary Law and the Penal Code regulate a humanitarian parole based on serious illness or the age of the prisoner (seventy years old and over), to avoid unnecessary sufferings. In both cases, the parole always must be approved by the Penitentiary Surveillance Judge, under the proposal of the penitentiary centres.
Personal, social and labour rights

Article 4 Penitentiary Statutory Instruments describes in detail the prisoner’s rights, including the right to life, physical and moral integrity, and the prohibition of torture or mistreatments. From these general rights derived the right to respect, dignity and privacy, as well as the right to exercise civil, political, social, economic and cultural rights, unless they are incompatible with or specifically denied by the sentence. Their rights to relate to the outside world and to have paid work within the possibilities of the Penitentiary Administration, as well as to participate in the activities of the centre and to formulate requests and complaints before the penitentiary judicial authorities and the district attorney, are specifically describe.

The penitentiary administration has the obligation to provide the prisoners an environment with good health and hygiene conditions as well as an access to health services.

Penitentiary Statutory Instruments have established that each prisoner have the right to an appropriate cell and access to health and hygiene. For this purpose, all penitentiary centres have their own medical services with medical staff and clinical facilities and all prisoners, like any other free citizen, have the right to access the universal health care system and the entire national health care network.

The penitentiary system has adopted a similar system regarding education with, on the one hand, scholastic units in all penitentiary centres, maintained by professionals of the public education system and, on the other hand, the possibility for all prisoners to access public universities.

The right of prisoners to paid work is limited by the statutory instruments. The statutory instruments do not completely recognize this right since it is conditioned by the penitentiary institutions having the capacity of offering work to all prisoners, which, unfortunately, still is a utopian ideal.

Contacts with the outside world

Both the General Penitentiary Law and the Penitentiary Statutory Instruments have established for all prisoners the rights to communicate with the outside world.

The prisoner has the right to ordinary communication with his family and relatives, as well as with the members of volunteer associations acting in the penitentiary system. These communications are normally made through glass and microphones. Direct physical contact is possible during extraordinary visit with the intimate partner and relatives in specific rooms that guarantee privacy.
Periodic correspondence and telephone communication is also recognised. All types of communications can be inspected for reasons of security and in certain cases, may require judicial authorisation.

_Treatment_

The General Penitentiary Law as well as the Penitentiary Statutory Instruments greatly emphasize on treatment. This is not only a right for all prisoners but also a tool to assess their behaviour. Since the adoption of the new Penal Code in 1996, the reduction of the sentence is essentially related to the progress made during the treatment and the lack of disciplinary measures. Specific organisms are in charge of analysing the prisoners and offering them treatment programs they consider suitable for their reintegration. Specific treatments are designed to prevent drug addiction, sexual aggression and domestic violence. They are usually carried out by the penitentiary system itself, or by public or private institutions such as non-governmental organisations which cooperate with the penitentiary centres.

_Internal and external security in prisons_

Internal and external security systems in prisons differ. Military units of agents of the Civil Guard control the area outside the prison while non-military civil officers are in charge within the walls. They do not possess any type of weapons and are only allowed to use coercion (e.g. personal defence, paralysing sprays) in serious situations.

_Penitentiary jurisprudence_

The Judges of Surveillance, the Provincial Hearings, the Supreme Court and in singular cases, the Constitutional Court, have created a solid jurisprudence. For example, the right of the penitentiary authorities to intervene in prisoners’ conversations has been limited by the statutory instruments. Letters or conversations with the defence counsels cannot be intercepted, even if the prisoner is known as very dangerous. Penitentiary jurisprudence has also extended the right to a lawyer for prisoners when they appeal any decision. Therefore, we believe that the legal framework of the penitentiary system can only be well understood in light of its interpretation, constantly complemented by the judicial resolutions.